FILED
JUL 25
CHARLES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 240

HARRY HANSON,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD A. MARKLEY,
Counsel for Lehigh Valley Railroad Company.

INDEX.

Subject Index.

	Page
Brief in opposition to petition for writ of certiorari	1
Statement of the case	1
Argument:	
I. Jurisdiction	4
II. The plaintiff was a mere licensee on the car of the defendant at the time of the accident and the United States Circuit Court of Appeals did not err in reversing the judgment	6
III. The plaintiff failed to prove that defendant's employees did not apply the brake and chock the car as required by custom	19
Conclusion	21

Table of Cases Cited.

Ackley v. *W. J. & S. R. R. Co.*, 76 N. J. L. 741	17
American Construction Co. v. *Jacksonville Railway*, 148 U. S. 372	5
Carey v. *Gray*, 98 N. J. L. 217	15
Denver v. *New York Trust Co.*, 229 U. S. 123	5
Erie R. R. Co. v. *Tompkins*, 304 U. S. 64	5, 6
Furey v. *N. Y. C. & H. R. R. Co.*, 67 N. J. L. 270	8
Gavin v. *O'Connor*, 99 N. J. L. 162	11
Hamilton Shoe Co. v. *Wolf Bros.*, 240 U. S. 251	5
Liveright v. *Lifsitz Furniture Co.*, 117 N. J. L. 243	13
Magnum Co. v. *Coty*, 262 U. S. 159	6
New York & New Jersey Telephone Co. v. *Speicher*, 59 N. J. L. 23	7
Ryerson v. *Bathgate*, 67 N. J. L. 337	16
Saunders v. *Eastern Hydraulic Brick Co.*, 63 N. J. L. 554	14
The Conqueror, 166 U. S. 110	5
The Three Friends, 166 U. S. 1	5

Statute Cited.

Judicial Code, Section 240 (28 U. S. C. A., Sec. 347, p. 359)	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 240

HARRY HANSON,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

(1)

Statement of the Case.

The plaintiff's action was brought to recover damages resulting from personal injuries sustained by him due to the alleged negligence of the defendant. The plaintiff was employed by Charles Merberg & Sons. Merberg & Sons were engaged in demolishing the refining plant of the American Sugar Company in Jersey City, New Jersey. This plant consisted of a large number of buildings occupying two square city blocks (R. 29, ll. 20-25). It was bounded on the east by Washington Street, on the west by Warren Street, on the north by Essex Street, and on the south by the Gap (a river) (R. 6 and 7; R. 30, ll. 1-20). Dudley Street, run-

ning east and west, was located approximately midway between Essex Street on the north and the Gap on the south (R. 30, ll. 20-25). A railroad track owned by the defendant was located in the center of Dudley Street, extending from Washington Street to and across Warren Street. This track had a slight down grade toward Warren Street.

The entire area occupied by the Sugar Company buildings, including both ends of Dudley Street, was enclosed by a fence (R. 34, l. 20, to R. 35, l. 20). This fence had been constructed by Merberg & Sons. It consisted of wooden posts extending upright four or five feet above the ground, with rails fastened from post to post at the top and midway between the top and the ground (R. 36, ll. 1-25). A gate was built across the track on Dudley Street at Warren Street (R. 34, l. 20, to R. 35, l. 20). Merberg & Sons maintained a day and night watchman to protect this area and their property contained within it (R. 33, ll. 20-23).

As the buildings were demolished large quantities of valuable scrap iron and steel were salvaged. In order to ship this material the defendant, a common carrier by railroad, placed at the request of Merberg employees, steel gondola cars on the track on Dudley Street for the purpose of being loaded (R. 8, ll. 5-10). These cars would be placed by the employees of the defendant. It was the custom and practice of the defendant's employees upon delivering the car on this track, to apply the hand brake and to place a piece of wood called a chock in front of one of the wheels (R. 4, and 5; R. 8, ll. 20-25; R. 9, ll. 5-10). The defendant had no control, custody or supervision of the cars after their delivery.

On the afternoon of September 22, 1936, a train crew of the defendant placed a car on this track and before leaving it they applied the hand brake and placed a chock in front of one of the wheels (R. 332-334). This car was delivered about 1 P. M., according to the train crew, or about 4 P. M.,

according to the plaintiff's witness (R. 112, ll. 5-10; R. 333, ll. 20-25; R. 342, l. 15, to R. 343, l. 10). The car, approximately fifty feet in length, was placed about fifty feet east from Warren Street (R. 36, ll. 10-20).

On the morning of September 23, 1936, about 11 or 11:15 A. M., the plaintiff was injured. He was the general superintendent of the entire job with approximately fifty men working under him. These men were divided into a number of small gangs, consisting of four or five men each (R. 7). One of these gangs at the time of the accident was engaged in tearing down the wall of the building located north of Dudley Street (R. 31, ll. 1-5). This work was being done by using a steel cable, one end of which was tied to the top of the wall and the other to a crane. The crane provided the power used to pull down the wall. This cable, made of steel, was seven-eighths of an inch in diameter and about three hundred feet long (R. 38, ll. 1-10). The wall to which it was attached was one hundred and fifty to two hundred feet north of the track (R. 41, ll. 1-25), about fifty feet east of the car (R. 73, l. 15, to R. 74, l. 5), and about ninety feet high (R. 41, ll. 1-25). The crane was fifteen or twenty feet south of the track and approximately in a line with the center of the car standing thereon (R. 44, ll. 10-25). The car had been partly loaded with about four tons of scrap iron (R. 46, l. 20, to R. 47, l. 10). This loading was being done by a different gang, from a pile of steel scrap on the ground which one of the men was cutting into short lengths (R. 143, ll. 1-15).

The cable was lifted over the top of the car (R. 45, ll. 12-15), and fastened to the axle of the crane located about two feet above the ground (R. 43, ll. 20-25). The plaintiff got into the car solely to place a plank between the top of the car on the south side thereof and his company's cable (R. 52, ll. 5-10; R. 53, ll. 1-10). He used an old plank eight feet long, three inches thick and eight inches wide (R. 50,

ll. 5-15). The sole purpose of placing this plank was to prevent the cable from being scraped and damaged by the edge of the car (R. 11, ll. 5-10). The plaintiff placed the plank lengthwise on top of the side of the car with the eight-inch surface of the plank on the four or five-inch surface of the car in about the center of the car (R. 15, ll. 20-25; R. 53, l. 20, to R. 54, l. 5). He then ordered the crane operator to move the crane so as to place a strain on the cable in order to take out the slack (R. 15, ll. 1-15). The crane moved in a southwesterly direction (R. 45, ll. 1-12.) The plaintiff, standing in the car, held the end of the plank while the strain was put on the cable by the movement of the crane (R. 55, ll. 1-8). The plaintiff then turned to walk toward the west end of the car when the car moved five or six feet to the west (R. 57, ll. 5-20). The plank which he had placed between the car and the cable whipped inside the car and struck him across the legs, causing his injury (R. 58, ll. 18-25). It was his intention to get out of the car before the pull was made which would bring down the wall (R. 60, ll. 15-20), for the reason that the flying bricks might reach the car (R. 61, ll. 1-10).

Fellow employees who came to the plaintiff's assistance testified that the brake on the car was not applied immediately after the accident and that there was no chock under the car wheel when they inspected a half hour after the accident.

(2)

ARGUMENT.

I.

Jurisdiction.

The defendant objects to the jurisdiction of the Court to grant the writ of certiorari.

The petition states the jurisdiction of this Court to be Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347,

p. 359). That section provides that in any civil case in a Circuit Court of Appeals, it shall be competent for the Supreme Court of the United States to require by certiorari either before or after a judgment or decree by such lower court, that the cause be certified to it for determination, with the same power and authority and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

In this case the petitioner recovered a money judgment in the United States District Court for the District of New Jersey, which on appeal to the United States Circuit Court of Appeals for the Third Circuit was reversed and "the cause remanded to the said district court with directions that a *venire de novo* issue, and that any further proceedings had shall be conformable with the opinion of this Court" (R. 20). Except in extraordinary cases the writ of certiorari is not issued until final judgment or decree, and this case cannot possibly be considered one coming within the category of an extraordinary case.

Hamilton Shoe Co. v. *Wolf Bros.*, 240 U. S. 251, 258;
American Construction Co. v. *Jacksonville Railway*, 148 U. S. 372, 378, 384;
The Three Friends, 166 U. S. 1, 49;
The Conqueror, 166 U. S. 110, 113;
Denver v. *New York Trust Co.*, 229 U. S. 123, 133.

It is urged in the petition for this writ of certiorari that jurisdiction should be taken because (a) the Circuit Court of Appeals decided the case in conflict with the decisions of the State of New Jersey, and (b) it overlooked a stipulation which was part of the evidence in the cause submitted to it (p. 8 of petition). That the Circuit Court of Appeals under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, applied the law of New Jersey to the case is clear from an examination of its opinion. It must be assumed that

it took into consideration all of the record before it, which included among other things the stipulation mentioned.

The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Its purpose, as indicated by Rule 38-(51) of this Court, is to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

It is urged as a further ground for invoking this Court's jurisdiction, that the ruling in this case is in conflict with the decisions of other Circuit and State Courts. This case was decided, as it had to be under the law of the State of New Jersey, without regard to the decisions of other Circuit or State Courts. *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64.

II.

The plaintiff was a mere licensee on the car of the defendant at the time of the accident and the United States Circuit Court of Appeals did not err in reversing the judgment.

The liability of the defendant must be determined by the common law of the State of New Jersey (where the accident occurred), and the decisions of that State accepted as such common law.

Erie R. R. Co. v. *Tompkins*, 304 U. S. 64.

The defendant as a common carrier was required by law to deliver cars to Merberg & Sons upon its request. Upon the delivery of such cars there arose, by operation of law, an implied invitation to the employees of Merberg & Sons to use the cars for the purposes for which they were delivered. The purpose for which these cars were delivered was

to be loaded with freight (scrap iron and steel) and later to be transported over the defendant's railroad.

If the injury to the plaintiff had occurred when he was engaged in loading the car or in moving the car to a place for loading—loading the car or moving it for loading being in each instance a purpose for which the defendant had delivered the car—the plaintiff would have been an invitee and the defendant under a duty to exercise reasonable care for his safety.

According to the undisputed evidence, however, the injury to this plaintiff occurred when he was engaged in using the car for a purpose entirely foreign from the loading or anything reasonably connected with the loading. His status, therefore, was that of a licensee to whom the only duty owing was to refrain from wanton or wilful injury, of which concededly there was no proof.

We shall discuss the New Jersey cases which substantiate the legal principles above enunciated.

New York & New Jersey Telephone Co. v. *Speicher*, 59 N. J. L. 23 (Supreme Court). The plaintiff in this case was an employee of a city. The pole from which he fell was owned and erected by the defendant telephone company. It was maintained in a public street upon condition that the topmost crossbar should be used by the city to carry the fire alarm wires. The Court in holding that a direction of a verdict in favor of the defendant should have been granted said (R. 24 and 25):

> "Assuming that the telephone company, invited Speicher to mount and descend the pole in discharging his duties to the city, in regard to its wires, what did it invite him to make use of in going up and coming down? Clearly, it would be held to the duty of reasonable care as to the strength and fitness of the pole to carry, the wires and the workman engaged in arranging and repairing them.

"But the sole object of the cross-bars is to carry the wires. He who maintains the cross-bars does it for that purpose, and his duty is thus limited. It is not perceived how his duty in that respect is extended by proof that linemen, in climbing, usually lay hold of and rely upon the cross-bars for support, in whole or in part. That custom is not, in this case brought home to the knowledge of the telephone company, but if it were it could not operate to compel them to make cross-bars intended for one purpose sufficiently strong for another purpose for which they were never intended. No invitation to use the cross-bars can be deemed to be extended to the lineman. When, therefore, a lineman makes use of a cross-bar in climbing, he steps beyond the limit of his invitation, and he who invited him to climb by the pole has no liability for any resulting injury.

"It results that it was error to permit the jury to consider whether the telephone company took reasonable care to have the cross-bar safe, and there should have been a direction for a verdict for the company, on the ground that it owed no duty to Speicher in respect to the cross-bar."

Furey v. *N. Y. C. & H. R. R. Co.*, 67 N. J. L. 270. This action was for personal injuries received by plaintiff upon the property of the defendant. The property in question was an enclosed shed that covered the central portion of a river pier, and was occupied by longitudinal lines of railroad tracks, upon which freight cars were loaded and unloaded. While attempting to cross the southernmost of these lines, the plaintiff was injured by the coming together of two freight cars between which he was about to pass. These cars were moved by the defendant without notice to the plaintiff. The plaintiff's contention was that the defendant should have given him some signal reasonably adapted to serve as a warning to him. The plaintiff was an employee of a painting contractor who, under contract with the defendant, was painting the outside of its shed.

The plaintiff had been on the job about two weeks and at the time he was injured, was quitting work for the day. His errand in the interior of the shed was to exchange his working clothes for his street dress, which was on the second floor of the shed. His purpose in passing between the cars was to reach a flight of steps at the west end of the building. He had been working upon the southeast corner of the shed.

On the question of invitation the trial Court held that an invitation to the plaintiff to use the opening between the cars as a crossing might be implied from the knowledge of the defendant's servants that such use was being made of the opening by the painters. In reversing a judgment recovered by the plaintiff the Court said:

> "Upon the case thus exhibited the paramount question is not whether the plaintiff was upon the defendant's property generally by way of invitation, but whether, upon any aspect of the testimony, the defendant can be said to have invited the plaintiff to make use of the openings between the freight cars as crossings of the railroad tracks in its shed. (P. 274) * * *
>
> "The general definition of invitation originally given by Chief Justice Bigelow, in *Sweeny* v. *Old Colony and Newport Railroad Co.*, 10 Allen 368, and adopted by this court in the opinion delivered in *Phillips* v. *Library Co., ubi supra*, is in these words:
>
> " 'The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place

was adapted and prepared or allowed to be used.' To which was added in original opinion the following:

"'A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises he thereby assumes an obligation that they are in a safe condition, suitable to such use, and for a breach of this obligation he is liable in damages to a person injured thereby' (pp. 274-275).

* * * * * * *

"Applying these definitions and tests to the circumstances of the present case, it is incumbent upon the plaintiff either to show that the opening between the cars was, in fact, designed to be used as he used it, or else to bring home to the defendant some act or conduct signifying that the place was so prepared or adapted which might naturally lead the plaintiff to suppose that he might properly and safely so use it. For these purposes, three lines of proof are available —*first*, as to the openings themselves; *second*, as to the use made of them by the employes of the defendant, and *third*, as to the use suffered to be made of them by the plaintiff and his associates.

"With respect to the openings themselves, it is an established fact that they resulted, not from design, but from the exigencies of the business transacted on the pier, and that they varied from day to day with the physical conditions that gave rise to them, viz., the placing of each car opposite to a door in the side of the shed. The use of these openings by the stevedores and train hands employed about the defendant's business was not evidence of any expectation or willingness on the part of the defendant that persons not so employed should use the openings. The fact that the plaintiff and his co-servants had repeatedly, without molestation, crossed the track through the openings in the broken freight trains could not, in the absence of any sign of preparation or adaptation, have evinced to

them that the openings were intended for their convenience, or that the general system from which the openings resulted was operated for their accommodation or had their safety in view. The character of the traffic and the obvious conditions that necessitated the breaking of the trains forbade such an implication in any ordinarily discerning mind. The plaintiff and his associates, by taking advantage of a constantly changing condition of things that evidently arose from causes unconnected with their presence upon the premises, could not impose upon the defendant a relationship to which it had, by no act of omission or commission, in anywise contributed. Knowledge is an element of invitation only when it is capable of throwing light upon the object with which a given use may have been permitted. Standing alone, it implies permission, but not invitation (pp. 275-276).

* * * * * * *

"There is still another phase of the case upon which nothing needs to be said, excepting that no decision with respect to it is to be inferred from this opinion. I refer to the nature of the errand of the plaintiff in the interior of the shed as bearing upon the question of invitation. His object was to exchange his working clothes for his street dress. If this was 'a matter in which the company had no concern,' to use the words of Mr. Justice Gummere in *Fitzpatrick* v. *Glass Manufacturing Co.*, 32 Vroom 378, it may be that 'he was saved from being a trespasser only by the fact that the company permitted him to come upon its premises for that purpose' " (p. 278).

Gavin v. *O'Connor*, 99 N. J. L. 162 (Errors and Appeals). Plaintiff's intestate, a boy eight years old, was fatally injured in the back yard attached to a two-family house belonging to the defendant, by the fall of a clothes pole erected and maintained by the defendant to support clothes lines extended from the house. Plaintiff and his family were tenants on the ground floor and the intestate was his

son, who, with several other boys, was playing in the back yard at the time. The pole was damaged and had been repaired by patching, but it had stood up until that time under the strain of such washed clothes as were hung on the lines and this was the sole purpose for which it was intended. At the time of the accident there were no clothes hung out but a line extended from the plaintiff's back window to the pole, and at least one of the boys was swaying on the line holding the rope in his hands and trying to touch the ground with his knees; and it was at this precise juncture that the pole fell. Affirming a judgment of nonsuit the court said:

> "The rule is thoroughly established in this state that the liability of the owner or occupier of premises who expressly or impliedly invites others to enter thereon is only co-extensive with his invitation; his duty of care is limited by that, and when the limits of the invitation are exceeded, it ceases, except as to acts willfully injurious. (p. 164) * * *
>
> "The rule has been uniformly applied by our courts in cases where some structural appliance has given way, and injury has resulted. The question in each case is, was the party injured invited, expressly or by implication, to make use of the appliance, whatever it was, in the way in which he did use it? If he was, a duty of care was raised; otherwise not (p. 164).
>
> * * * * * * *
>
> "In the case at bar, the evidence raises no such question. Obviously, a clothes pole is not erected in the backyard of a tenement, and clothes lines extended thereto, for boys to swing on. If one of these boys had been sliding down the baluster rail of the front stairs, and it had broken with his weight, or if he had climbed to the top of the pole and it had fallen with him, we venture to say that no court would hold that there was any duty of the owner to provide a stair rail that would hold a sliding boy, or a clothes pole that

would be appropriate and adequate for him to climb. If the boys were invited to use the yard, and the pole had broken under the strain of a normal amount of clothes on the lines, a different case would be presented; but we are unable to see in this case anything beyond a use of the pole for a purpose never contemplated by the defendant, and as to which use he was under no duty of care" (pp. 165-166).

Liveright v. *Lifsitz Furniture Co.*, 117 N. J. L. 243 (Errors and Appeals). The plaintiff in this case was a furniture salesman. He entered defendant's furniture store for the purpose of selling furniture. He made no sale. He endeavored to buy a piece of novelty furniture for a friend, but the defendant did not have it in stock. He used the defendant's 'phone to make a personal call and then inquired as to the location of the toilet, as well as asked permission to use the same. He fell and was injured while entering the toilet. The court, holding as a matter of law that he was a mere licensee, said:

"The only question involved is what duty was owing by the defendant to the plaintiff under the circumstances as presented by the proof. It was the duty of the defendant to exercise ordinary care to render the premises reasonably safe for invitees thereon, so long as the invitee did not go beyond the bounds of the invitation. The implied invitation to enter the store which was incident to the sale or purchase of furniture, did not constitute an invitation to the plaintiff to use either the telephone or the toilet in the store, and when he used these facilities for his own purpose and benefit, his status became that of a licensee, and this being so, the defendant was only liable for willful injury. Neither the telephone nor toilet was maintained by the defendant for the use and accommodation of customers, and such use was not within the limits of the implied invitation to the plaintiff.

"It is well established in this state that the liability of an inviter is circumscribed by the invitation and

does not extend to invitees whose injuries are received while using the premises not within the limits of the invitation, and the mere passive acquiescence by the owner in a certain use of his property imposes no obligation upon him to keep it in a safe condition for the benefit of the user" (p. 244).

Saunders v. *Eastern Hydraulic Brick Co.*, 63 N. J. L. 554 (Errors and Appeals). The plaintiff in this case was a workman in the employ of the defendant. One of the defendant's buildings in which it carried on its business, had a roof, nearly flat, in which was a "skylight" fitted for two panes of glass, 20 x 40. The skylight was on about the same plane as the roof, and there was a mullion, dividing the frame and sustaining the contiguous parts of the panes of glass. One of the panes was broken, and the plaintiff, who was a glazier, was directed by the defendant to put a new pane in the place of the broken one. In attempting to do so, plaintiff put his hand upon the centerpiece or mullion and leaned with so much weight of his body upon it as to break it.

The court in affirming a judgment of nonsuit said:

"But the purpose of the mullion in this skylight was to aid in the support of the panes of glass. The master's duty was to have it so constructed as to reasonably answer that purpose, but it is impossible to discover any ground in reason for imposing upon the master any duty to have it so constructed as to bear the weight or any part of the weight of a servant, although engaged in repairing it.

"The duty of the master in this respect is like that of one who invites another to make use of some place or appliance and is limited to the care requisite for the reasonable use thereof for the purposes for which it is designed. *New York and New Jersey Telephone Co.* v. *Speicher*, 30 Vroom 23, S. C., 31 Id. 242.

"Doubtless the work of replacing the glass would have required the use of some force upon the mullion

to remove the old putty. The case indicates that the mullion broke under plaintiff's pressure before he had begun to exert force for that purpose. In that aspect it is plain that defendant was not liable for plaintiff's injury, because, as just stated, it owed him no duty to furnish a mullion strong enough to bear his weight or any part of it."

Carey v. *Gray*, 98 N. J. L. 217 (Errors and Appeals). Defendants were the owner and tenant respectively of a house. The tenant employed the plaintiff to disinfect the house. The plaintiff went to the house, which was unoccupied, at night, to do this work. While thus engaged he desired to use a toilet. He found the one in the house out of repair and not usable. He left the house and discovered in the yard of the premises, a closet, which he entered and was injured in so doing. The court, in affirming a judgment of nonsuit, said:

"Our reports contain numerous cases where persons who have been invited upon premises have sustained injuries for which the owner or occupier has been held not to be responsible because the invitee has used the premises for a purpose not included within the bounds of the invitation (p. 220).

* * * * * * *

"Let us then apply these legal principles to the facts of the present case. The defendant, Flynn, engaged the plaintiff to disinfect the house. When the plaintiff went to the house for this purpose, he was upon the premises by the implied invitation of Flynn. Flynn owed him the duty, while engaged in his work, of exercising ordinary care to render the premises reasonably safe for the work for which he was engaged. The implied invitation to enter the house, which was an incident to the contract made between Flynn and the plaintiff, was not an invitation to the plaintiff to use, if occasion required, either the toilet in the house

or the closet in the yard. The plaintiff was a workman casually employed to work in an unoccupied house which he knew from observation, before he went to the yard, was out of repair. He was not a servant and member of a household to whom a master would owe a duty to use ordinary care to furnish reasonably safe toilet facilities. When the plaintiff left his work to seek a toilet he was pursuing a purpose of his own. He was then exceeding the bounds of his invitation. He was deprived during his search for a toilet of the right of protection against dangers or pitfalls upon the premises which he enjoyed while prosecuting the work for which he was hired. His status became that of a licensee. When the plaintiff went to the yard and entered the defective closet he did so at his own risk, and Flynn was not responsible for his injuries. It follows that if Flynn, who had hired the plaintiff, is not liable to the plaintiff, that the owners of the premises, Mr. and Mrs. Gray, who had no knowledge that the plaintiff was to enter upon the premises, are also not liable to the plaintiff'' (pp. 221-222).

Ryerson v. *Bathgate*, 67 N. J. L. 337 (Errors and Appeals). The plaintiff kept a small place of business in Newark, and the defendants were the proprietors of a meat shop nearby, which was in charge of one Silvernail as manager. The plaintiff owned a cat, of which she desired to be rid, and this fact she made known to Silvernail, who told her that the defendants needed a cat, and suggested that she bring it over to them. Accordingly, a few days later, she carried over the cat and upon entering the defendant's premises found Silvernail there alone. As she entered, she told him that he must put the cat in a closet or else it would run away. Silvernail thereupon walked to the opposite side of the room, opened a door and said, ''Put her in here.'' Plaintiff supposed it to be a closet. Silvernail only partially opened the door, and as he did so she ran and stooped to put the cat down. The cat at the time was scratching her and she was anxious to get it out of her

arms. She did not look in beyond the open doorway, but took it for granted the opening led to a closet. The opening in fact led to a cellar and as she stepped inside she fell down the stairs.

The trial Court nonsuited the plaintiff and this ruling was affirmed on appeal. The Court said:

> "* * * The owner's liability for the condition of the premises is only co-extensive with his invitation. And it is incumbent upon the plaintiff to show, not only that her entry upon the premises was by invitation of the owner, but also that at the time the injury was received she was in that part of the premises into which she was invited to enter, and was using them in a manner authorized by the invitation, whether express or implied (pp. 338-339).
>
> * * * * * * *
>
> "The case shows that Silvernail formed a correct judgment of the exigencies of the problem, and that the plaintiff did not. He opened the cellar door barely wide enough to enable her to inject the cat according to the approved method, at the same time saying, 'Put her in here.' That was the extent of the invitation. The plaintiff exceeded the bounds of the invitation, and in doing so became a mere licensee" (p. 340).

Ackley v. *W. J. & S. R. R. Co.*, 76 N. J. L. 741 (Errors and Appeals). Plaintiff, the consignee of a carload of stone, was notified by the defendant railroad that the car had arrived and he was required to unload it within a fixed time in order to avoid the payment of demurrage. The plaintiff, with his employees, went to the company's property for the purpose of unloading the cargo and found that the car had been placed upon a side track parallel with the main line track. He was able to approach the opposite side of the car without obstruction, and he thereupon caused his wagon to be placed along that side of the car and proceeded to remove the stones from the car to the wagon. The stones were so heavy that they could not be taken from

the car to the wagon without the use of a piece of timber. The plaintiff took a piece of timber and placed it so as to reach from the car to the wagon. This timber was so long that it extended beyond the side of the car which was nearest to the main line track. While the timber was in this position, an engine moving on the main line struck it, as a result of which the plaintiff was injured.

The plaintiff was nonsuited in the trial Court and that judgment was affirmed in the Court of Errors and Appeals. On the question of invitation the Court said:

> "The plaintiff was on defendant's premises by invitation, for the placing of the car upon the side track where it could be unloaded, and the notification to unload, was an invitation to go upon the defendant's premises for that purpose, and defendant owed to plaintiff a degree of care co-extensive with it, but the extent of the invitation is the limit of defendant's duty in the premises, and the extent of such duty must be gathered by implication from the circumstances established by the undisputed testimony. We are asked in this case to infer that because the plaintiff was invited to the defendant's premises to unload a car, such an invitation implied the right to obstruct the passage of trains along a track adjacent to the car being unloaded, with a timber which the plaintiff brought upon the premises for the purpose of moving the stone from the car to a wagon standing on the side of the car away from the main line (p. 742).
>
> * * * * * * *
>
> "No inference can be drawn from the evidence in this case that the defendant knew, or ought to have known, that when it invited the plaintiff on its premises for the purpose of unloading the car, he would bring there a timber fourteen feet in length and so place it on the car as to project over it a sufficient distance to come in contact with trains passing along another track, and there is no evidence of any act or conduct of the defendant that affords a reasonable basis for the claim

that it had led the plaintiff to believe that it intended its invitation to go to that extent. Nor is there any evidence to support a reasonable inference that the plaintiff had any such belief.

"The application of the rule always depends upon the particular facts of the case under consideration, for the owner's liability is only co-extensive with his invitation, and it is incumbent upon the plaintiff to show that, at the time the injury was received, he was acting within the limit of his invitation, and that there was a reasonable basis for a belief, on the part of the inviter, that the invitation implied the right to create the situation under which it is claimed the rule becomes applicable.

"In this case the invitation was to go upon the premises and by necessary implication with horses, wagons and required appliances, to unload the car on the side of it away from the main line, and the mere using of the main track, in the absence of any notification that in carrying out the purpose of the invitation the plaintiff was about to infringe on that track, was no breach of the invitation given" (pp. 743 and 744).

III.

The plaintiff failed to prove that defendant's employees did not apply the brake and chock the car as required by custom.

The car in question was delivered by the defendant into the exclusive custody and control of the plaintiff's employer on the day before the accident. This delivery was either about 1 P. M., or between 4 and 5 P. M., on that date (R. 112, 11. 5-10; R. 333, 11. 20-25). The testimony of the defendant's conductor and trainmen is uncontradicted that when the car was delivered they applied the hand brake and placed a wooden chock under the wheel (R. 334, 11. 10-25; R. 342, 1. 15, to R. 343, 1. 10). The plaintiff and his fellow employees worked until 5 P. M. on the night before the accident and from 7 to 11 A. M. on the day

of the accident. During this time they had loaded at least four tons of scrap iron into this car (R. 46, l. 20, to p. 47, l. 10). During the night of September 22nd, the car was under the care of a night watchman working under the plaintiff. No proof was offered to negative the idea that while the car was in the exclusive control of the plaintiff the hand brake had not been released or the chock removed.

The proof offered to establish that the defendant failed to brake or chock the car consisted of three items, viz., (1) that the car moved six or seven feet at the time of the accident; (2) that the brake was not applied when inspected immediately after the accident (R. 145, ll. 18-25) and (3) that there was no chock under the wheel a half hour after the accident (R. 116, ll. 13-20; R. 118, ll. 5-15).

The trial court apparently felt the jury could infer from the proof that because the brake was not applied and the chock not in place after the accident, the defendant's servants did not apply the brake or place the chock. If no proof had been offered by the defendant perhaps this inference would have been permissible, this for the reason that the defendant's failure to show facts necessarily within its knowledge would be in the nature of an admission against it that the facts proven by the plaintiff were true. In this case, however, the defendant did show by positive and uncontradicted testimony that the brake was applied and the chock placed when the car was delivered. The plaintiff had it within his power to show that no change had occurred between the time the car was delivered and the time of his accident. It was, we respectfully contend, his duty to produce such proof and his failure to produce it is in the nature of an admission against him in that respect.

Conclusion.

It is respectfully submitted that the petition for the writ of certiorari should be denied.

Dated: July 25, 1941.
Jersey City, New Jersey.

EDWARD A. MARKLEY,
Attorney for and of Counsel with
Lehigh Valley Railroad Company.

(5501)